

Brown (Migration) [2018] AATA 1563 (23 April 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Supicha Brown

CASE NUMBER: 1703504

DIBP REFERENCE(S): BCC2016/3749266

MEMBER: Margie Bourke

DATE: 23 April 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 and cl.820.221 of Schedule 2 to the Regulations.

Statement made on 23 April 2018 at 4:15pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether the applicant is in a genuine spousal relationship with the sponsor – Joint household – Joint finances – Relationship held out to others – Evidence of ongoing commitment – Genuine spousal relationship exists – Whether the applicant is validly sponsored – Sponsor sponsored another person in the preceding 5 years – Sponsorship limitation exists - Whether compelling circumstances exist to waive sponsorship limitation – Best interests of young child – Compelling circumstances exist – Decision remitted with direction

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 360(2)

Migration Regulations 1994 (Cth), rr 1.03, 1.15A(3), 1.20J, 1.20KA, Schedule 2, cls 820.211(2)(a), 820.211(2)(c), 820.221

CASES

Bretag V MILGEA FCCA 582

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 15 February 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 9 November 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied there was sufficient evidence to demonstrate the applicant was the spouse of the sponsor.
4. The applicant provided the Tribunal with extensive material relevant to the relationship and the child of the relationship. The Tribunal has determined that it can make a decision favourable to the applicant based on the information available to it without proceeding to a hearing pursuant to s.360(2) of the Act. The following are the reasons the Tribunal has concluded that the matter should be remitted for reconsideration.
- 5.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The main issues in the present case is whether the applicant is the spouse of the sponsor, and the sponsor meets the sponsorship requirements.

SPOUSE/DE FACTO (cl.820.211(2)(a), cl.820.221)

Whether the parties are in a spouse or de facto relationship

7. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Based on the information recorded on the copy of the sponsor's Australian passport and on his child's birth certificate I am satisfied that the sponsor was born in Tasmania and is an Australian citizen by birth. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
8. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

9. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. Based on the registered marriage certificate, I am satisfied the parties were married in New Farm, in Queensland on 23 October 2016 and the marriage was registered on 26 October 2016. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

10. I have considered that in the Department's decision record dated 15 February 2017 the delegate concluded that there was not sufficient evidence to demonstrate that the applicant was the spouse of the sponsor. I have noted that the delegate recorded there was no evidence of the parties' financial situation, limited evidence in relation to the nature of the household the parties had not provided statements from family and friends and not provided evidence of the applicant's pregnancy, or a registered marriage certificate.
11. The tribunal has been provided with a breadth of information. The Tribunal has been provided with the birth certificate of the parties' child who was born in April 2017, extensive photographs of the parties, detailed statements from the applicant, the sponsor, from the applicant's sister-in-law, medical reports, family tax benefit reports, confirmation of the parties' joint bank account, bank records, travel documents, and receipts.
12. After considering all this information I am satisfied that the applicant and sponsor are married, and moved to Hobart prior to the birth of their child, to live with the sponsor's parents and his brother, his partner and their child. I am satisfied that the sponsor transferred his job from Queensland to Tasmania and the sponsor left her work in March 2017. I am satisfied the parties reside with the sponsor's parents and family. I am satisfied that the applicant and sponsor are supported in the care of their first child by the sponsor's parents and his brother and sister-in-law. I am satisfied that their social arrangements are currently focused around their young daughter, and that they socialise with the sponsor's extended family in Hobart and day trips in Tasmania. I am satisfied that the applicant and sponsor plan to have more children. I am satisfied the sponsor is transferring to a new job in May and that the parties plan to open a food business together sometime in the future. I am satisfied the parties have some small debts, and that the applicant's only income is through family tax benefit. I am satisfied the parties share their daily expenses and finances. I am satisfied that in the future the parties hope to travel to Thailand to visit the applicant's family and plan together in the future to buy home.
13. Based on the information before me I am satisfied that the parties do not own assets or have significant liabilities together. I accept that the sponsor is working full-time and the applicant cares full time for their child. I accept that the parties share their day-to-day household expenses, which are limited given they are residing with the sponsor's parents. The evidence of the financial aspects of the relationship indicate that the parties are in a genuine and continuing relationship.
14. Based on the information before me I am satisfied that the parties share joint responsibility for the care and support of their child, although the applicant is at home all day with the baby. I am satisfied that the parties live in a house owned by the sponsor's parents, and is also shared with the applicant's brother and his partner and child. I am satisfied that the parties contribute to the house work, including cooking and cleaning. The evidence of the nature of the household of the parties indicates that the parties live together, and not separately and apart, on a permanent basis, and that they are in a genuine and continuing relationship.

15. Based on the information before me I am satisfied that the parties represent themselves to other people including family, friends and community as being married to each other. I am satisfied based on the information provided to the tribunal, that family and friends are of the opinion that the relationship is a genuine and happy one, and the parties are devoted to their daughter. Based on the photographs and other documents provided to the Tribunal I am satisfied that the parties undertake joint social activities at home playing with their daughter, attending family functions and travelling on day trips as a family. The evidence of the social aspects of the relationship indicates that the parties are in a genuine and continuing relationship, and have a mutual commitment to a shared life as husband and wife to the exclusion of all others.
16. Based on the information before me I am satisfied that the parties married in 2016 and moved to Hobart in early 2017, and their child was born in April 2017. I am satisfied that the parties provide companionship and support to each other, particularly in the raising of their first child. Based on the information before me in relation to their plans for the future, I accept the parties plan to have more children, travel to meet the applicant's family in Thailand, establish a business and purchase a home. I am satisfied that the parties see the relationship as long-term. The evidence of the nature of the persons' commitment to each other indicates that the relationship is genuine and continuing and that the parties have a mutual commitment to a shared life as husband and wife, to the exclusion of all others.
17. I have considered the circumstances of the relationship as set out in r.1.15A(3). I have applied the principles espoused in *Bretag V MILGEA* FCCA 582 and I have considered the evidence of the subsequent history of the relationship when making findings relevant to the time of application, so long as the evidence tends to show the existence or nonexistence of facts relevant to the issue to be determined. I am satisfied that at both the time of application and the time of decision the parties meet the requirements for being in a spousal relationship within the meaning of s.5F(2)(b)-(d).
18. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
19. Therefore the applicant meets cl.820.211(2)(a).

Is the applicant sponsored?

20. Clause 820.211 requires at the time of application, the applicant meets one of several alternative sub criteria. These include 820.211(2)(c) which requires that the applicant was, at the time of application, sponsored by the sponsor, where such person has turned 18; or where they have not, by the sponsor's parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or eligible New Zealand citizen (as defined in r.1.03 of the Regulations).
21. At the time of decision, the applicant must continue to be sponsored by the sponsor, and the sponsorship must have been approved by the Minister and be still in force. Exceptions apply in certain circumstances where the sponsor has died, or family violence has occurred, or a child is involved. For visa applications made on or after 18 November 2016, the sponsor must also have consented for the Department to disclose to each applicant any conviction for a relevant offence, unless the conviction has been quashed or otherwise nullified, or where the sponsor has been pardoned with the effect that he or she is taken never to have been convicted of the offence: cl.820.221.
22. Approval of sponsorship is subject to limitations contained in r.1.20J of the Regulations which sets a limit on the number of people that a person can sponsor in a lifetime and a

minimum time that must lapse between each sponsorship, and in r.1.20KA which sets a limit on the period before which certain Parent visa holders can sponsor another person for a Partner visa. There are further limits imposed by r.1.20KB in relation to sponsors charged with, or convicted of, certain offences where the visa application was made on or after 27 March 2010, and r.1.20KC for sponsors convicted of a relevant offence who have a significant criminal record in relation to the relevant offence where the visa application was made on or after 18 November 2016.

23. At the time of application, based on the Australian issued passport of the sponsor and the sponsorship forms, I am satisfied of the identity of the sponsor and that he is over the age of 18 years. Based on information available to me I am satisfied that the applicant meets the requirements of cl.820.211(c) at the time of application.
24. In the sponsorship form, the sponsorship recorded that he had previously sponsored a de facto partner, Ms Lam, in a visa application. The sponsor recorded that the date of the sponsorship/nomination was 15 August 2013. He recorded the relationship ended on 17 January 2016. On the Department file there is an email address to the sponsor that states the sponsorship of Ms Lam commenced on 5 August 2013 and resulted in the grant of a permanent visa. The email advises that this sponsorship therefore cannot be withdrawn. The email says that the sponsorship of this applicant (the subject of the current review) cannot be approved because he has sponsored a partner previously and the visa has been granted and less than five years have passed since the date of the application was lodged that visa.
25. This matter was not recorded in the Department's decision record dated 15 February 2017. The tribunal is of the view that r.1.20J is engaged in this matter. R.1.20J(1) requires subject to subregulation (2) and (3) if a person applies for a visa mentioned in subregulation (1AA) as the spouse, de facto partner or prospective spouse of the sponsor, the Minister must not approve the sponsorship of the applicant unless the Minister is satisfied that (a) not more than one other person has been granted a relevant mission as (i) the spouse, de facto partner or prospective spouse of the sponsor on the basis of a sponsorship or nomination; or (ii) a person who ceased a relationship of the kind mentioned in subparagraph (i) with the sponsor after the person, or another person mentioned in the prescribed criteria for the visa, had suffered family violence committed by the sponsor; and (b) if another person has been granted a relevant permission in the circumstances referred to in paragraph (a) – not less than five years has passed since the date of making the application for that relevant permission; and (c) if the sponsor was granted a relevant permission as the spouse, de facto partner or prospective spouse of another person on the basis of a sponsorship or nomination – not less than five years at passed since the date of making the application for that relevant permission.
26. However r.1.20J(2) states despite subregulation (1) the Minister may approve the sponsorship of an applicant for a visa if the Minister is satisfied that there are compelling circumstances affecting the sponsor.
27. I am satisfied based on the information contained in the applicant's sponsorship form, and the consistent information recorded in the email to the sponsor on the Department file, that the sponsor did sponsor or nominate a previous partner in August 2013 which resulted in the grant of a visa for that previous sponsored person. I am satisfied the five years have not expired since that previous sponsorship and therefore r.1.20J is engaged.
28. I have considered the letter from the sponsor dated 6 December 2016 in which he writes prior to the birth of his child that he wants his baby to have the same opportunity as everyone in this country with access to good hospitals and schools, and then he wants to provide a good home for the applicant and his baby and he asks for the sponsorship limitation to be waived. I have considered the photographs of the applicant and sponsor

together. I have considered the letters from the applicant in relation to her life with the sponsor and the child. I have considered the letter from the applicant and sponsor's sister-in-law in relation to their life with the baby.

29. I am satisfied that the birth of the applicant's and sponsor's child in April 2017, the family life the sponsor has developed through his move to Hobart with the applicant and the life the sponsor has built around that child amounts to compelling circumstances. I am satisfied the birth of the child in Hobart in April 2017 and the family life involving the baby with the applicant and the sponsor, amount to compelling circumstances affecting the sponsor. I am satisfied that the sponsorship limitation should be waived and the sponsorship by the sponsor of the applicant should be approved.
30. I am satisfied at the time of decision that the sponsor continues to sponsor the applicant and that the sponsorship should be approved by the Minister.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

31. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
32. There is no evidence before the tribunal that the applicant was not the holder of a substantive visa time of application, and therefore cl.820.221(2)(d) does not apply.
33. For the above reasons the tribunal is satisfied that the applicant meets the requirements of cl.820.211(2)(a), (c) and (d) at the time of application, and therefore meets the requirements of cl.820.211.
34. The tribunal is satisfied that the applicant continues to meet the requirements of cl.820.211(2)(a) and (c) at the time of decision. Further the tribunal is satisfied that compelling circumstances exist so that the sponsorship should be approved by the Minister and the sponsorship limitations should not apply. Therefore the applicant meets the requirements of cl.820.221.
35. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
- 36.

DECISION

37. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211 and cl.820.221 of Schedule 2 to the Regulations.

Margie Bourke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or

- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.